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### Grandparent Visitation Rights in Ohio after Grandchild Adoption: Is It Time to Move in a New Direction

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# GRANDPARENT VISITATION RIGHTS IN OHIO AFTER GRANDCHILD ADOPTION: IS IT TIME TO MOVE IN A NEW DIRECTION?

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## I. INTRODUCTION

At common law in Ohio, grandparents had no legally-protected right to visit their grandchildren.<sup>1</sup> However, about twenty years ago Ohio courts began to decide the question of whether such a right exists for grandparents.<sup>2</sup> Many of the cases were decided on the issue of whether such visitation was in the best interest of the grandchild.<sup>3</sup> Ohio courts used the best interest of the child test in situations where the child was adopted by a relative following the death of

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<sup>1</sup>*In re Whitaker*, 522 N.E.2d 563 (Ohio 1988).

<sup>2</sup>*See, e.g., In re Griffiths*, 353 N.E.2d 884 (Ohio Ct. App. 1975). The court looked at the best interests of the child after determining that grandparents have a statutory right to visit their grandchildren after the death of a natural parent and the surviving parent's remarriage to a stepparent who adopted the child. *Id.*

<sup>3</sup>*See, e.g., Graziano v. Davis*, 361 N.E.2d 525 (Ohio Ct. App. 1976) (advocating a case-by-case determination of whether grandparent visitation was in the grandchild's best interests).

the child's parent, as well as after a stepparent adoption following the divorce of the child's natural parents.<sup>4</sup> Ohio courts formerly read the Ohio statutes as allowing visitation if it was in a child's best interest.<sup>5</sup>

The Ohio Supreme Court took a different turn in 1991 when it held, in *In re Adoption of Ridenour*, that grandparents have no right to visitation after their grandchildren are adopted by a stranger.<sup>6</sup> The court continued in that direction when it held, three years later in *In re Martin*, that grandparents do not have the right to visit their grandchildren following the adoption of the child by relatives.<sup>7</sup> The court, however, did not rule on whether a parent's death followed by a stepparent adoption terminates the visitation rights of grandparents. Thus, Ohio courts have remained split over whether to grant visitation rights in such situations.<sup>8</sup>

Some state courts have declined to follow Ohio's lead in cases in which a grandchild is adopted by a stepparent following the divorce of the child's natural parents.<sup>9</sup> These states have followed *Ridenour*, in that they do not allow visitation where the child has been adopted by a stranger.<sup>10</sup> In addition, psychologists and commentators have suggested that visitation following stepparent adoption may, in some instances, be healthy for a child.<sup>11</sup>

This note will explain why the Ohio legislature should change the current law regarding grandparent visitation following the adoption of their grandchildren. This note will first explore the way that Ohio looked at the issue of grandparent visitation following the adoption of their grandchildren prior to the Ohio Supreme Court decisions in *Ridenour* and *Martin*. Then this note will examine *Ridenour* and *Martin*. Next this note will discuss other states' laws which allow grandparent visitation following a stepparent adoption. Finally,

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<sup>4</sup>See *In re Pennington*, 562 N.E.2d 905 (Ohio Ct. App. 1988) (adoption following parent's death); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250 (Ohio Ct. App. 1986) (adoption following parents' divorce).

<sup>5</sup>OHIO REV. CODE ANN. § 3109.11 (Banks-Baldwin 1986) (companionship and visitation rights where parent is deceased); See also, OHIO REV. CODE ANN. § 3109.05 (Banks-Baldwin 1984) (award of visitation rights is in the court's discretion); *Welsh v. Laffey*, 474 N.E.2d 681 (Ohio Ct. App. 1984). The court held that there are compelling reasons to allow grandparent visitation following a stepparent adoption in instances where a child's natural parent has died or the child's natural parents have divorced.

<sup>6</sup>*In re Adoption of Ridenour*, 574 N.E.2d 1055 (Ohio 1991).

<sup>7</sup>*In re Martin*, 626 N.E.2d 82 (Ohio 1994).

<sup>8</sup>*Beard v. Pannell*, 674 N.E.2d 1225 (Ohio Ct. App. 1996) (holding grandparent visitation is not allowed after an adoption following a parent's death); *Longwell v. White*, No. 7-95, 1996 WL 72613 (Ohio App. 5 Dist. Jan. 5, 1996) (holding an adoption following a natural parent's death does not automatically terminate a grandparent's visitation rights).

<sup>9</sup>See, e.g., *Kanvick v. Reilly*, 760 P.2d 743 (Mont. 1988).

<sup>10</sup>See, e.g., MISS. CODE ANN. § 93-16-7 (1988); N.M. STAT. ANN. § 40-9-2 (Michie 1997).

<sup>11</sup>See, e.g., ARTHUR KORNHABER, M.D., *CONTEMPORARY GRANDPARENTING* (1996).

this note will examine some of the studies and commentaries which suggest that grandparent visitation following stepparent adoption may be in the best interests of the children.

## II. HISTORY OF GRANDPARENT VISITATION AFTER ADOPTION IN OHIO

### *A. Right to Visitation after Parent Has Died and Child Is Adopted*

Ohio courts generally looked to see whether allowing grandparent visitation was in the child's best interest in cases where a child's natural parent died and the child was subsequently adopted by the stepparent.<sup>12</sup> In *Graziano v. Davis*, an Ohio appellate court decided that the child's best interests should be the controlling factor in such cases, and the decision to grant visitation rights should be determined on a case-by-case basis.<sup>13</sup> The court reasoned that prohibiting grandparent visitation in all cases following a parent's death and a later stepparent adoption would be too strict a rule that in some cases would actually be against the best interests of the child and even be harmful to the child's well-being.<sup>14</sup> The court read the best interest test into the legislature's purpose in enacting section 3109.11.<sup>15</sup> The court in *Graziano* found that grandparent visitation would be in the child's best interest because the child formerly had a close relationship with the grandparents and there was evidence of the grandparents' love for the child.<sup>16</sup>

Other Ohio cases also dealt with the question of whether grandparent visitation would be in the best interest of the child following the death of a natural parent and a stepparent adoption. Generally, it had been determined that grandparent visitation in such situations was in the best interest of the child.<sup>17</sup> Ohio courts also looked to section 3109.04 to determine whether visitation was in the child's best interest.<sup>18</sup> Section 3109.04 lists factors to be

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<sup>12</sup>*Graziano v. Davis*, 361 N.E.2d 525 (Ohio Ct. App. 1976).

<sup>13</sup>*Id.* at 530.

<sup>14</sup>*Id.* The court commented on the problems of society, such as an increase in teenage drug abuse and drinking, and felt that at least some of the problems stem from the fact that the family is not receiving the support it needs from extended family.

<sup>15</sup>*Id.*; see also OHIO REV. CODE ANN. § 3109.11 (Banks-Baldwin 1997). "If either the father or mother of an unmarried minor child is deceased, the court . . . may grant the parents . . . of the deceased father or mother reasonable companionship or visitation rights . . . if the court determines that the granting of the . . . rights is in the best interest of the minor child."

<sup>16</sup>*Graziano*, 361 N.E.2d at 527.

<sup>17</sup>*In re Griffiths*, 353 N.E.2d 884 (Ohio Ct. App. 1975).

<sup>18</sup>See *In re Whitaker*, 522 N.E.2d 563 (Ohio 1988). Although the statute specifically states the guidelines for determining the child's best interest in the context of child custody proceedings, the court held that these same guidelines are pertinent to situations regarding visitation as well. See also OHIO REV. CODE ANN. § 3109.04 (Banks-Baldwin 1988).

used to determine whether visitation is in the child's best interest, including the child's wishes if the child is older than eleven years old and the child's adjustment.<sup>19</sup> Specific situations where visitation was found to be in the child's best interest include: (1) instances in which the grandparent had previously maintained contact with the grandchild for the child's entire life;<sup>20</sup> and (2) where the grandparent had maintained contact with the child each day while the child's two natural parents were married.<sup>21</sup>

Ohio courts did not restrict the use of the best interest test to instances where the child was adopted by a stepparent following the death of one natural parent. The test was also applied where the natural mother had died and the paternal grandparents adopted the children.<sup>22</sup> The court, in *In re Pennington*, found that because the maternal grandparents had visited the grandchildren regularly since their births (for six and eight years) and had demonstrated love for the children, the continuation of such visitation was in the children's best interests.<sup>23</sup> However, grandparent visitation was not granted in a case where the grandmother's daughter had died and her husband gave up his parental rights, resulting in an adoption by strangers.<sup>24</sup> The court, however, limited its holding to the facts of that case and did not expand its holding to all like cases.<sup>25</sup>

However, the best interest test was not always easily met. Although section 3109.11 provides for visitation rights after the death of a child's natural parent, the child's best interests must be met in order for visitation to occur.<sup>26</sup> For example, it was found that a child's best interest would not be served by visitation with grandparents whom the child, age thirteen, refused to see because he hated them and found them to be "obnoxious," and to have nothing in common with him.<sup>27</sup> The court denied the grandparent's petition for

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<sup>19</sup>§ 3109.04.

<sup>20</sup>*In re Thornton*, 493 N.E.2d 977 (Ohio Ct. App. 1985). Following the death of the child's natural mother, the grandparents were not allowed to visit their grandchildren after the child's natural father became involved with his present wife and the child's adoptive mother.

<sup>21</sup>*Graziano*, 361 N.E.2d at 526. The paternal grandparents sought visitation rights with their grandchildren following the death of the children's natural father and the natural mother's remarriage and the children's adoption by the mother's new husband. Before the current visitation dispute, the grandparents had maintained contact with the children and their natural mother. The children's mother had lived next door to the grandparents in a house owned by the grandparents before moving out and not telling the grandparents where she and the children went or that she remarried. *Id.*

<sup>22</sup>*In re Pennington*, 562 N.E.2d 905 (Ohio Ct. App. 1988).

<sup>23</sup>*Id.* at 906.

<sup>24</sup>*In re Adoption of Barnhart*, No. 1222, 1985 WL 6525 (Ohio Ct. App. Feb. 1, 1985).

<sup>25</sup>*Id.* at \*2.

<sup>26</sup>See *In re Griffiths*, 353 N.E.2d 884 (Ohio Ct. App. 1975); OHIO REV. CODE ANN. § 3109.11 (Banks-Baldwin 1997).

<sup>27</sup>*In re Griffiths*, 353 N.E.2d at 886.

visitation even though the child's feelings stemmed from what the child's parents had told him about his grandparents.<sup>28</sup>

*B. Right to Visitation After Divorce and Stepparent Adoption*

Ohio courts decided whether to grant grandparent visitation in part by relying on section 3109.051, which provides criteria for determining visitation rights following the divorce of a child's parents.<sup>29</sup> According to section 3109.051, the court may consider the following factors: the child's prior relationship with the grandparent; the distance to the grandparent's home; the child's age and health; and the mental and physical health of the grandparent.<sup>30</sup> Ohio courts have held that grandparent visitation is in the child's best interest following the divorce of a child's parents and a subsequent adoption by a stepparent when the child and grandparent had frequent contact through phone calls, visits, and activities.<sup>31</sup> Even though section 3107.15 terminates the legal relationship of natural relatives following an adoption, the courts reasoned that section 3109.05 superseded that statute in cases of divorce, since specific statutes take precedence over general statutes.<sup>32</sup>

Parties opposed to grandparent visitation tried to differentiate between the granting of visitation rights following the death of a parent and visitation rights following a divorce and stepparent adoption. One way was by stating that the death of a parent should not affect the relationship between grandparents and grandchildren because such an event is involuntary and tragic, while a divorce is a voluntary action.<sup>33</sup> However, courts rejected this idea since such a position focuses on the actions of the parents, while it is the children who are affected when visitation rights are changed.<sup>34</sup> Therefore, the best interest test was used

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<sup>28</sup>*Id.* at 886. The facts of the case show that the child's natural parents eloped against the wishes of the mother's parents. As a result, the relationship between the mother's parents and the father was never amicable. When the child's mother died and the father remarried, the child's natural father stopped all contact between the child and his natural maternal grandparents. The child's present attitude toward his grandparents are the result of the child's father and adoptive mother transmitting their feelings about the grandparents to him. Although the child's parents now are encouraging the child to visit his grandparents, he now refuses.

<sup>29</sup>OHIO REV. CODE ANN. § 3109.051 (Banks-Baldwin 1997); *see, e.g.*, *Bente v. Hill*, 596 N.E.2d 1042 (Ohio Ct. App. 1991).

<sup>30</sup>§ 3109.051.

<sup>31</sup>*Bente*, 596 N.E.2d at 1043.

<sup>32</sup>*See* OHIO REV. CODE ANN. § 3109.05 (Banks-Baldwin 1991) (amended by § 3109.051 1990); OHIO REV. CODE ANN. § 3107.15 (Banks-Baldwin 1991); *Bente*, 596 N.E.2d at 1044.

<sup>33</sup>*Lattanzio v. Lattanzio*, No. 91-C-8, 1992 WL 48502 (Ohio Ct. App. Mar. 5, 1992). The grandparents were permitted to visit their grandchildren following the dissolution of the parent's marriage and the mother's remarriage followed by her husband's adoption of the child.

<sup>34</sup>*Id.* at \*2.

on a case-to-case basis in order to curtail the breakdown of the family, which the court hoped would ultimately lead to a better childhood and a better society.<sup>35</sup>

One Ohio court tried to reconcile section 3107.15 with the idea of granting visitation rights under section 3109.05. The court posited that the reasons given for permitting grandparent visitation under section 3109.11 after a parent's death and the child's adoption are just as compelling as allowing visitation after a divorce and subsequent adoption.<sup>36</sup> The court then used the best interest test and determined that, on the advice of a psychologist, visitation would be in the child's best interests.<sup>37</sup> The court's reason for using the best interest test as opposed to automatically terminating the child's relationship with the grandparents upon an adoption was to give meaning to the visitation allowed under section 3109.05.<sup>38</sup> In addition, the court did not want to put an absolute ban on grandparent visitation in situations where there has been a divorce and a subsequent stepparent adoption, because in many situations such a ban would be "cruel" to a child.<sup>39</sup>

The Ohio courts prior to *Ridenour* and *Martin* generally held that the best interests of the child should take precedence over the actions of the parents, either in the way their marriages ended or in the way they felt about the grandparents. Also, courts seemed willing to find that grandparent visitation would be in the best interest of the child if there had been a prior relationship between the child and grandparent. Finally, although section 3107.15 severs all ties between an adopted child and his natural relatives, Ohio courts have held that because section 3109.11 specifically allows for visitation grants in the event of a parent's death and section 3109.05 allows visitation after a divorce, those statutes should control in those situations. The Ohio Supreme Court would change the way that courts interpreted the statutes dealing with visitation.

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<sup>35</sup>*Id.*

<sup>36</sup>*Welsh v. Laffey*, 474 N.E.2d 681 (Ohio Ct. App. 1984).

<sup>37</sup>*Id.* at 682-83.

<sup>38</sup>*Id.* at 685.

<sup>39</sup>*Id.* The court gave an example of a situation where the denial of grandparent visitation following an adoption would be cruel to a child. This situation would occur where a child has visited his grandparents for his entire life and receives attention not from his parents but instead only from his grandparents. This cruel situation would become worse if the adoptive stepparent also shows no interest in the child. In such a situation, the child, if forced to stop seeing his grandparents, could be deprived of the only love and affection that he has ever really known.

## III. THE OHIO SUPREME COURT CASES AFFECTING GRANDPARENT VISITATION

A. *In Re Adoption Of Ridenour*

In *In re Adoption of Ridenour* two children whose biological mother had died and whose biological father had given up his parental rights were adopted.<sup>40</sup> The children's grandparents considered filing for custody of the children, but because of the grandparents' advanced age and standard of living, they decided against pursuing adoption.<sup>41</sup> As a result, the Fairfield County Children Services obtained permanent custody of the children on the same day that the grandparents were awarded visitation rights.<sup>42</sup> When the children's foster parents petitioned to adopt the children, the court of appeals held that the adoption should be denied.<sup>43</sup> The court reasoned that the children must be placed in an environment free from conflict during grandparent visitation.<sup>44</sup> The court further reasoned that the best home for the children would be a place where the love and interest of the grandparents and the grandchildren were allowed to flourish.<sup>45</sup> Also, the court believed that severing an older child's bonds with his or her natural relatives following adoption could be psychologically harmful for the child and could prevent the child from adjusting to the child's adopted family.<sup>46</sup> The court believed that the petitioning family could not provide the special love that only a grandparent could give.<sup>47</sup>

In discussing section 3107.15, the court held that the statute only severed the adopted child's relationship with natural relatives for economic purposes such as inheritance.<sup>48</sup> The court did not find anything in the statute that forbade a trial court from granting visitation rights to grandparents if such rights were in the child's best interest.<sup>49</sup> Because grandparents had been granted visitation rights following the death of a parent and a subsequent adoption, the court reasoned that there was no difference between the love of a grandparent for a

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<sup>40</sup>*In re Adoption of Ridenour*, No. 16-CA-89, 15-CA-89, 1990 Ohio App. LEXIS 639 (Ohio Ct. App. Feb. 20, 1990).

<sup>41</sup>*Id.* at \*1.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at \*3.

<sup>44</sup>*Id.*

<sup>45</sup>*Ridenour*, 1990 Ohio App. LEXIS 639, at \*5.

<sup>46</sup>*Id.* at \*8.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at \*10; see also OHIO REV. CODE ANN. § 3107.15(A)(1) (Banks-Baldwin 1997) ("[T]he adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and the interpretation . . . of documents, statutes, and instruments . . . which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship").

<sup>49</sup>*Ridenour*, 1990 Ohio App. LEXIS 639, at \*10.



child whose parent had died and one whose parents were divorced.<sup>50</sup> The court also held that the purpose of both statutes is to promote the best interests of the child.<sup>51</sup> Thus, the appellate court held that it was in the best interest of the children to be placed in a home where grandparent visitation would be unimpeded.<sup>52</sup>

The Ohio Supreme Court reviewed and overturned the decision of the appellate court.<sup>53</sup> The Ohio Supreme Court ruled that the best interests of the children could have been served by granting the adoption.<sup>54</sup> The following factors suggested that adoption by the foster family was in the children's best interests: (1) the foster family's stable marriage; (2) their experience in child-rearing; (3) the length of time the children spent with them; and (4) the stable and religious home life provided by the foster family.<sup>55</sup> The court reasoned that by prohibiting the adoption the children may be hurt by being forced to move into a number of temporary homes and by possibly being separated.<sup>56</sup> There was also evidence that grandparent visitation was not in the children's best interests, as these visits upset the children and affected the way they acted.<sup>57</sup> Thus, there was evidence to conclude that the lower court took the interests of the grandparents into account when deciding upon visitation, while ignoring the best interests of the children.<sup>58</sup>

The court then looked to see if Ohio courts could even consider the issue of grandparent visitation when a child is adopted.<sup>59</sup> The court held that they could not, because section 3107.15 terminates all relationships between the adopted child and the natural relatives.<sup>60</sup> The court conceded that section 3109.051 allows grandparent visitation under certain circumstances.<sup>61</sup> The statute, however, does not mention that grandparent visitation rights survive

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<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at \*11.

<sup>52</sup>*Id.* at \*5.

<sup>53</sup>*In re Adoption of Ridenour*, 574 N.E.2d 1055 (Ohio 1991).

<sup>54</sup>*Id.* at 1058.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 1059.

<sup>58</sup>"[The court] denied the adoptions simply and solely because of the difficulties it would create for grandparent visitation rights." *Ridenour*, 574 N.E.2d at 1059.

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 1060.

<sup>61</sup>*Id.* at 1061. "In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding, . . . the court may grant reasonable companionship or visitation rights to any grandparent . . . if . . . the court determines that the granting of the companionship or visitation rights is in the best interest of the child." OHIO REV. CODE ANN. § 3109.051 (Banks-Baldwin 1990).

an adoption.<sup>62</sup> In addition, different policy considerations underlie the passage of sections 3107.15 and 3109.051.<sup>63</sup> The divorce statute (§ 3109.051) tries to preserve the now-shattered family by allowing visitation in order to minimize the disruption that the child experiences in his familial relationships.<sup>64</sup> In contrast, the purpose of the adoption statute, section 3107.15, is to separate the child from his former relationships so that he now has a new identity.<sup>65</sup> Without this severance of relationships, the adopted child's life could be upsetting and stressful, as two sets of parents compete for the child's affection.<sup>66</sup> Another outcome of allowing post-adoption visitation under section 3109.051 is that potential adoptive families would be discouraged from adopting if they knew they would, potentially, be forced to have a relationship with the natural parents.<sup>67</sup> Therefore, in the absence of legislation to the contrary, the court refused to allow grandparent visitation in cases of stranger adoption.<sup>68</sup>

*B. In Re Martin*

In the case of *In re Martin*, the Supreme Court of Ohio answered the question of whether there could be grandparent visitation following the adoption of a grandchild by relatives.<sup>69</sup> In *Martin*, the grandchild's parents were never married.<sup>70</sup> The son of the paternal grandparents filing for the right to visitation was presumed to be the child's father.<sup>71</sup> The child's maternal grandparents adopted her, prompting the paternal grandparents to seek visitation rights.<sup>72</sup>

Even if the court assumed that the father of the child was the petitioning grandparent's son, the court held that visitation rights still could not be granted to the grandparents.<sup>73</sup> Looking again at section 3107.15, the court did not see an explicit statement in the statute which distinguished between adoptions by strangers and adoptions by relatives.<sup>74</sup> As a result of *Ridenour*, in the absence

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<sup>62</sup>*Ridenour*, 574 N.E.2d at 1062.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Ridenour*, 574 N.E.2d at 1062.

<sup>68</sup>*Id.* at 1063.

<sup>69</sup>*In re Martin*, 626 N.E.2d 82 (Ohio 1994).

<sup>70</sup>*Id.* at 82.

<sup>71</sup>Under Ohio Revised Code § 3111.03, because the son's name appeared on the birth certificate, he is presumed to be the child's father until such a presumption is rebutted. *Martin*, 626 N.E.2d at 83.

<sup>72</sup>*Id.* at 82.

<sup>73</sup>*Id.* at 84.

<sup>74</sup>*Id.* at 85.

of any statutory language making distinctions between the effect of stranger and non-stranger adoptions, section 3107.15 forbids grandparent visitation following adoptions by relatives.<sup>75</sup>

#### IV. OHIO COURT DECISIONS FOLLOWING *RIDENOUR* AND *MARTIN*

After *Martin* extended the holding of *Ridenour* to forbid grandparent visitation after grandparent adoption as well as after adoption by strangers, there was still the question of visitation rights after a stepparent adoption. A few months after *Martin* was decided, the Ohio Supreme Court held, in *Sweeney v. Sweeney*, that grandparents did not have visitation rights following the adoption of their grandchildren by stepparents.<sup>76</sup> The court relied on the holdings of *Ridenour* and *Martin* to reach its decision, even though *Ridenour* seemed to suggest that, following a stepparent adoption, grandparent visitation could be allowed.<sup>77</sup>

After *Ridenour* was decided, but before *Martin* and *Sweeney*, not all courts in Ohio believed that *Ridenour* terminated the rights of grandparents to visit their grandchildren after a stepparent adoption.<sup>78</sup> Trial courts in Ohio still denied adoption petitions by stepparents for fear that such an adoption could destroy the relationship that existed between grandparents and a grandchild.<sup>79</sup> Some courts still viewed such a severance of relationships after an adoption as a harmful and traumatic event for a child.<sup>80</sup> Forbidding grandparent visitation was not always seen to be in the best interests of the child.<sup>81</sup> At least one appellate court read *Ridenour* as preserving a grandparent's right of visitation after a stepparent adoption, thus alleviating some of the fear that the child's best interests would not be served following a stepparent adoption.<sup>82</sup>

Another Ohio court refused to come to a different conclusion than the *Ridenour* court ultimately reached even while failing to recognize a difference between stepparent and stranger adoptions.<sup>83</sup> In *Farley v. Farley* the court interpreted section 3109.051(B) as allowing grandparent visitation in instances

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<sup>75</sup>*Id.*

<sup>76</sup>*Sweeney v. Sweeney*, 642 N.E.2d 629 (Ohio 1994).

<sup>77</sup>*Id.* at 629; *Ridenour*, 574 N.E.2d at 1062. The *Ridenour* court stated: "[A]t least five states which permit grandparent visitation after a stepparent adoption specifically terminate or authorize termination of grandparent visitation rights if the child is adopted by a stranger." *Id.*

<sup>78</sup>*See, e.g.,* *Pilarczyk v. Janoske*, No. 90-G-1589, 1991 WL 244668 (Ohio Ct. App. Nov. 22, 1991).

<sup>79</sup>*Id.* at \*3.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Farley v. Farley*, 619 N.E.2d 427 (Ohio Ct. App. 1992).

of divorce, dissolution of marriage, separation, annulment, and child support proceedings.<sup>84</sup> The court refused to include adoption as an additional situation where visitation could be allowed, because section 3109.051(B) does not specifically mention adoption.<sup>85</sup> The court read section 3107.15 as denying standing to grandparents where the parental rights of their bloodline descendants were terminated by adoption.<sup>86</sup> The grandparents' rights, like the parents' rights, were seen as being terminated by the adoption.<sup>87</sup> This court was using what is sometimes called the "derivative right theory" to explain how grandparent visitation rights can be terminated.<sup>88</sup> However, at least one court refused to apply the effect of adoption provided in section 3107.15 to situations where the parent in the same bloodline as the grandparent seeking visitation had died.<sup>89</sup> The court believed that the legislature had preserved the right of grandparent visitation in such situations.<sup>90</sup>

The Ohio Supreme Court's decision in *Ridenour* was reached after a careful reading of sections 3107.15 and 3109.051.<sup>91</sup> Because within those statutes there is no explicit statement which provides that grandparent's visitation rights should not be terminated following an adoption, an Ohio appellate court refused to provide for such an exception.<sup>92</sup> In the absence of such a statutory exception, the court came to the same conclusion as that reached in *Ridenour*, which held that grandparent visitation terminated upon the grandchild's adoption.<sup>93</sup>

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<sup>84</sup>*Id.* at 428.

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 429.

<sup>87</sup>*Id.* "A final decree of adoption . . . shall have the following effects . . . : . . . to relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and his relatives." OHIO REV. CODE ANN. § 3107.15(A)-(A)(1) (Banks-Baldwin 1992).

<sup>88</sup>Peter A. Zablotsky, *To Grandmother's House We Go: Grandparent Visitation After Stepparent Adoption*, 32 WAYNE L. REV. 1, 30 (1985). The author stated that the derivative right theory works to terminate grandparent visitation rights upon the termination of the natural parent's rights to the adopted child. *Id.* This theory rests on the belief that the grandparent's rights to the child flow from the parent's rights. *Id.* The author believes that this theory is flawed because there are often instances in which statutes specifically give grandparents rights which are independent of the parent's rights.

<sup>89</sup>*Farley*, 619 N.E.2d at 429.

<sup>90</sup>*Id.* "[I]f a parent of a child dies without the relationship of parent and child having been previously terminated and a spouse of the living parent thereafter adopts the child, the child's rights . . . are not restricted or curtailed by the adoption." OHIO REV. CODE ANN. § 3107.15(B) (Banks-Baldwin 1992).

<sup>91</sup>*Krnac v. Starman*, 615 N.E.2d 344 (Ohio Ct. App. 1992).

<sup>92</sup>*Id.* at 345.

<sup>93</sup>*Id.*

The holding in *Ridenour* was a departure from the holdings of Ohio courts prior to that decision. In cases such as *Welsh v. Laffey*, courts held that sections 3109.05 and 3109.11 allowed grandparent visitation if such visitation was found to be in the child's best interests.<sup>94</sup> These courts were willing to use these statutes to support visitation even in the face of section 3107.15.<sup>95</sup> The *Ridenour* court read these statutes differently, and held that section 3109.051, which amended section 3109.05 by mentioning grandparents as relatives who may petition for visitation rights,<sup>96</sup> does not apply to adoption situations. The *Ridenour* court also read section 3107.15 as terminating the rights of all the child's biological relatives following the child's adoption. The statutes remained virtually the same. It was only the courts which read them differently prior to and following the interpretation in *Ridenour*.

Neither *Ridenour* nor *Martin* resolved the issue of whether grandparent visitation is terminated when a child's adoption follows the death of the child's natural parent.<sup>97</sup> Courts which have found that grandparent visitation is not automatically terminated in such situations looked to the statutes mentioned in *Ridenour* and *Martin*.<sup>98</sup> Section 3107.15(B) specifically provides for grandparent visitation after the parent's death.<sup>99</sup> Although *Martin* held that section 3107.15 does not distinguish between stranger and relative adoption, that holding was based on subsection (A).<sup>100</sup> Subsection (B) of section 3107.15 provides that if a child is adopted following the death of a parent, the child's rights are not changed.<sup>101</sup> This subsection has been read to allow courts to decide whether grandparent visitation is in the child's best interest.<sup>102</sup>

Because of the lack of direction given by the Ohio Supreme Court, other courts have held that there is a termination of grandparent visitation rights following the death of the child's parent and the child's adoption.<sup>103</sup> In some instances, grandparents have made the argument that section 3109.11 allows grandparent visitation after the death of a child's parent and the other parent's remarriage followed by a stepparent adoption.<sup>104</sup> Not all courts have agreed

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<sup>94</sup>*Welsh v. Laffey*, 474 N.E.2d 681, 685 (Ohio Ct. App. 1984).

<sup>95</sup>*Id.*

<sup>96</sup>*In re Adoption of Ridenour*, 574 N.E.2d 1055, 1061 (Ohio 1991). The statute stated that in cases of divorce, dissolution, separation, or child support proceedings, the court may grant visitation rights to grandparents.

<sup>97</sup>*See Ridenour*, 574 N.E.2d 1055; *In re Martin*, 626 N.E.2d 82 (Ohio 1994).

<sup>98</sup>*See, e.g., Longwell v. White*, No. 7-95, 1996 WL 72613 (Ohio Ct. App. Jan. 5, 1996).

<sup>99</sup>*Farley v. Farley*, 619 N.E.2d 427 (Ohio Ct. App. 1992).

<sup>100</sup>*Longwell*, 1996 WL 72613, at \*2.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*See Beard v. Pannell*, 674 N.E.2d 1225 (Ohio Ct. App. 1996).

<sup>104</sup>*Longwell*, 1996 WL 72613, at \*2.

with this argument.<sup>105</sup> At least one court has interpreted section 3109.11 as only preserving grandparent visitation rights after the death of one of the child's parents and the other parent's remarriage.<sup>106</sup> The section does not expand the rights of grandparent visitation to apply after a stepparent adoption following such a death and remarriage.<sup>107</sup>

Section 3107.15 has also been interpreted differently by those courts which have found that there are grandparent visitation rights following a parent's death and a subsequent stepparent adoption and those that have not.<sup>108</sup> The courts which have held that grandparent visitation rights do not survive a parent's death and a stepparent adoption interpret section 3107.15 as merely preserving the child's rights that come from the deceased parent, such as inheritance.<sup>109</sup> Read in this way, the statute says nothing about grandparent visitation rights.<sup>110</sup> In addition, in grandparent visitation cases, it is the grandparents who are attempting to assert rights, not the child.<sup>111</sup> If the statute is read in that way, then there would be no exception to section 3107.15 (A), as found in subsection (B), in situations where grandparents seek visitation rights following a parent's death and a stepparent adoption.<sup>112</sup>

The Ohio Supreme Court has allowed courts to interpret those statutes which deal with the situation of a stepparent adoption following the death of a natural parent in different ways. The court has allowed this by not providing its own interpretation as to whether sections 3109.11 or 3107.15 provide for grandparent visitation in such situations. A similar situation arose when grandchildren were adopted by strangers or relatives and grandparents sought to assert visitation rights. The Ohio Supreme Court settled those issues by giving its own interpretation of those statutes. Although the Ohio Supreme Court has the decisive interpretation of such statutes, the court still only chose between two different prior interpretations. The court chose to view the adoption statute as superseding the visitation statute by reading the rights conferred to grandparents as derivative of the parent's rights to the child.

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<sup>105</sup>*Beard*, 674 N.E.2d at 1227.

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>OHIO REV. CODE ANN. § 3107.15 (Banks-Baldwin 1997).

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Wehrley v. Apple*, No. 93-VA-59, 1994 WL 515116 (Ohio Ct. App. Sept. 21, 1994).

<sup>112</sup>*Id.*

## V. STATES OTHER THAN OHIO ALLOWING VISITATION AFTER STEPPARENT ADOPTION

Montana is one state that was in a situation similar to Ohio's but which now allows grandparent visitation following adoption in limited circumstances.<sup>113</sup> Montana's section 40-9-102 specifically names grandparents as people who may petition the court for rights of visitation.<sup>114</sup> The statute only allows visitation if the child has been adopted by a stepparent or grandparent.<sup>115</sup> In

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<sup>113</sup>MONT. CODE ANN. § 40-9-102 (1997). Other state statutes also grant visitation rights to grandparents following grandchild's adoption by a stepparent: ALA. CODE § 26-10A-30 (1996) (visitation allowed after relative adoption if it is in the grandchild's best interest); CAL. FAM. CODE § 3102 (West 1997) (rights following death of one parent and adoption by stepparent or grandparent); FLA. STAT. ANN. § 752.07 (West 1997) (adoption by stepparent does not terminate rights); GA. CODE ANN. § 19-7-3 (1997) (allowed after relative and stepparent adoption); 750 ILL. COMP. STAT. ANN. 5/607 (West 1997) (allowed after stepparent adoption); 755 ILL. COMP. STAT. ANN. 5/11-7.1 (West 1997) (allowed after adoption by "close relatives"); IND. CODE ANN. § 31-17-5-9 (Michie 1997) (visitation rights survive adoption by stepparent or biological relative); IOWA CODE ANN. § 598.35 (West 1997) (case law interprets statute as allowing visitation after stepparent adoption); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1997) (visitation rights not terminated after termination of parental rights); LA. CIV. CODE ANN. art. 214 (West 1997) (relationship between child and blood relatives remain the same); LA. CODE JUV. PROC. ANN. art. 1264 (West 1997) (limited visitation rights after natural parent's death and child is adopted); MD. CODE ANN., FAM. LAW § 5-308 (1997) (rights not automatically terminated upon adoption); MD. CODE ANN., FAM. LAW § 9-102 (1997) (rights granted if in child's best interest); MINN. STAT. ANN. § 257.022 (West 1997) (when unmarried child is deceased or the child's rights are terminated by adoption, child's parent may be granted visitation rights to grandchild if it is in the grandchild's best interest); MISS. CODE ANN. §§ 93-16-3, 93-16-7 (1997) (visitation after stepparent adoption if grandparent had "viable" relationship with grandchild); MO. ANN. STAT. § 452.402 (West 1997) (rights not terminated when adopted by stepparent, grandparent, or other blood relative); NEV. REV. STAT. ANN. § 125 A. 330 (Michie 1997) (rights when parent's rights have terminated); N.C. GEN. STAT. § 50-13.2A (1997) (rights where child adopted by stepparent or relative and there was a prior "substantial" relationship between the child and grandparent and visits are in the child's best interest); N.J. STAT. ANN. § 9:2-7.1 (West 1997) (child's best interest test); N.M. STAT. ANN. § 40-9-2 (Michie 1997) (visitation after adoption by stepparent, relative, and other specified persons); OKLA. STAT. ANN. tit. 10, §§ 5, 7505-6.5 (West 1997) (rights given in limited circumstances if in the child's best interest and a relationship previously existed); OR. REV. STAT. § 109.332 (1997) (after stepparent adoption if previous substantial relationship, in child's best interest, and does not interfere with child's adopted family); 23 PA. CONS. STAT. ANN. § 5314 (West 1997) (if adopted by stepparent or grandparent); R.I. GEN. LAWS § 15-5-24.1 (1997) (visitation after death of one parent); S.C. CODE ANN. § 20-7-1770 (Law. Co-op. 1997) (case law interprets statute as giving rights when father died and stepfather adopted); S.D. CODIFIED LAWS § 25-4-52 (Michie 1997) (best interest test when adopted by stepparent or grandparent); TEX. FAM. CODE ANN. § 153.434 (West 1997) (limited rights after stepparent adoption); WIS. STAT. ANN. § 48.925 (West 1997) (visitation if had a relationship similar to parent-child relationship and it is in the child's best interest and will not undermine adoptive parent's relationship with child).

<sup>114</sup>"[T]he district court may grant to a grandparent of a child reasonable rights to contact with the child . . . ." MONT. CODE ANN. § 40-9-102(1) (1997).

<sup>115</sup>§ 40-9-102(5).

all other instances, grandparent contact with the child automatically terminates upon the child's adoption.<sup>116</sup> Montana's law would agree with the holding in *Ridenour* because grandparents in Montana would also have no right to visit their grandchildren following an adoption by strangers. Montana's grandparent visitation statute, however, is directly in opposition to the holdings of *Martin* and *Sweeney* because Montana grandparents have the right to petition for visitation rights following an adoption by the child's grandparents or stepparents.

The rule concerning grandparent visitation rights in Montana is illustrated in the case *Kanvick v. Reilly*.<sup>117</sup> In *Kanvick*, the Montana Supreme Court resolved the issue of whether Montana allowed grandparents to have visitation rights in the face of two conflicting statutes.<sup>118</sup> Section 40-9-102 allows grandparent visitation if such visitation is determined to be in the best interest of the child.<sup>119</sup> Under this section, the courts may grant visitation rights when the child is adopted by grandparents or stepparents.<sup>120</sup> This statute seems to directly conflict with section 40-8-125.<sup>121</sup> That section provides that after an adoption is granted, the child's natural parents and natural relatives have no more rights to the child.<sup>122</sup>

The court resolved the conflict by looking at ways in which courts in other states dealt with disputes over whether to grant grandparents the right to visit their grandchildren after an adoption.<sup>123</sup> The court conceded that the majority of states interpreted their visitation statutes to be limited by their adoption statutes.<sup>124</sup> However, the court examined the concurrences in these jurisdictions, which were generally sympathetic toward the grandparent's

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<sup>116</sup>*Id.*

<sup>117</sup>760 P.2d 743 (Mont. 1988). The visitation dispute was fueled by the fact that the child's natural father, who allegedly sexually abused his daughter, was present during some of the grandparent's visits with the child at their home. Because the grandparents were unable or unwilling to restrict their son's access to their house, the visits could not continue. This holding illustrates the fact that even if grandparents are allowed to petition for visitation rights following the adoption of their grandchildren, the decision to grant or deny the petition is still dependent upon a showing that continued visitation is in the child's best interests.

<sup>118</sup>*Id.* at 745.

<sup>119</sup>*Id.* "Visitation rights granted under this section may be granted only upon a finding by the court . . . that the visitation would be in the best interest of the child." MONT. CODE ANN. § 40-9-102(2) (1988).

<sup>120</sup>§ 40-9-102(5).

<sup>121</sup>MONT. CODE ANN. § 40-8-125(2) (1988) (repealed 1997).

<sup>122</sup>"After a final decree of adoption is entered, the natural parents and the kindred of the natural parents of the adopted child . . . shall be relieved of all parental responsibilities for said child and have no rights over such adopted child . . . ." *Id.*

<sup>123</sup>*Kanvick*, 760 P.2d at 745.

<sup>124</sup>*Id.* at 746.



situation. The concurrences identified that the decisions the courts made were necessary yet harsh.<sup>125</sup> The court also found more persuasive arguments in the opinions of courts which held that, in the face of similarly conflicting statutes, there existed an exception in situations where relatives adopted the children.<sup>126</sup>

Additionally, when looking at the statutes, the court did not see any legislative intent or public policy reason to hold that the visitation rights of grandparents are terminated following an adoption by a stepparent.<sup>127</sup> This conclusion was reached by looking at the language of section 40-9-102, which differentiates between situations where a child is adopted by strangers and when the child is adopted by a stepparent or grandparent.<sup>128</sup>

Montana was faced with the same dilemma as Ohio in that both states had statutes which terminated grandparent visitation after the child's adoption but also had provisions which allowed grandparents to visit their grandchildren if it was in the child's best interest. One way in which the interpretation of Montana's laws differed from Ohio's interpretation is that Montana had a statute which specifically authorized grandparent visitation after a relative adoption. Ohio's statutes specifically stated that grandparents could visit their grandchildren following the death or divorce of a parent if it was in the child's best interest. However, the Ohio statutes were silent concerning visitation rights following stepparent adoption.

The second part of the Montana court's analysis in *Kanvick* consisted of looking at the way other courts dealt with similar situations. The Montana court realized that even though other courts read their statutes as not allowing visitation after adoption, those courts did not think that such a result was in the child's best interests. The Ohio Supreme Court in *Ridenour* felt that there were situations in which grandparent visitation following a stepparent adoption would be in the child's best interests.<sup>129</sup> However, the *Ridenour* court felt restrained by section 3107.15 and could not allow such visitation until the

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<sup>125</sup>*Id.* "I must agree with the legal premise set forth in the opinion in this case. However, I feel compelled to raise a voice in the hope that in a more enlightened time, the strong and natural love that grandparents have for their grandchildren will be recognized." *Mead v. Owens*, 254 S.E.2d 431, 432 (Ga. Ct. App. 1979) (Shulman, J., concurring).

<sup>126</sup>*Kanvick*, 760 P.2d at 747. Courts have sometimes held that to allow visitation by natural relatives following the child's adoption would have the effect of discouraging families from petitioning to become adoptive parents. This was one of the concerns in *Ridenour*. However, an Illinois court felt that these concerns are not as important in stepparent adoption situations. *Lingwall v. Hoener*, 483 N.E.2d 512 (Ill. 1985). The court reasoned that since stepparent adoptions follow a marriage that did not occur solely for the chance to adopt a child and these adoptions may even occur in the face of regular visitations between the child and its noncustodial, natural parents, these concerns did not justify denying visitation. *Id.*

<sup>127</sup>*Kanvick*, 760 P.2d at 747.

<sup>128</sup>*Id.*

<sup>129</sup>*In re Adoption of Ridenour*, 574 N.E.2d 1055, 1062 (Ohio 1991).

state legislature decided to amend the statute. Montana found that its statute which terminated the rights of all natural relatives following adoption could be reconciled with another statute which made an exception to the general rule and allowed grandparent visitation after a relative adoption if it is in the child's best interests.

Mississippi is another state that allows grandparent visitation to occur in limited circumstances. The Mississippi Supreme Court held in *Olson v. Flinn* that an adoption by a stepparent after the death of a natural parent automatically terminated the visitation rights of the natural grandparents.<sup>130</sup> Realizing the harshness of such a holding, the legislature amended two statutes which were read by the *Olson* court as mandating that grandparent visitation cease following adoption of their grandchildren.<sup>131</sup> Since the statutes' amendments, the court held that grandparent visitation was permitted after a stepparent adoption.<sup>132</sup>

The Mississippi court that decided *Olson* was unable to find that grandparent visitation survived the termination of a child's parental relationship, unlike the Montana court. Therefore, the legislature, which realized the harsh results if grandparents were automatically denied visitation rights following a stepparent adoption, amended its grandparent visitation statutes to allow for grandparent visitation under limited circumstances. This is the approach which the Ohio Supreme Court favored in *Ridenour*. The *Ridenour* court, realizing that in certain instances grandparent visitation would benefit the grandchild, nonetheless was restrained from allowing such visitation absent a mandate from the state legislature. Therefore, in order for Ohio courts to allow grandparent visitation after stepparent or stranger adoptions, the legislature would have to amend section 3107.15.

New Mexico has adopted a statutory scheme which allows for grandparent visitation in limited circumstances.<sup>133</sup> The child's biological grandparents may be granted visitation rights if the child is adopted by a stepparent, a relative, a person designated to care for the child in the deceased parent's will, or a godparent.<sup>134</sup> The biological grandparents may be granted visitation rights in these circumstances if such visitation would be in the best interests of the

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<sup>130</sup>*Olson v. Flinn*, 484 So.2d 1015 (Miss. 1986).

<sup>131</sup>*Howell v. Rogers*, 551 So. 2d 904 (Miss. 1989). "Whenever a court of this state enters a decree . . . terminating the parental rights of one of the parents of the minor child, or whenever one of the parents of a minor child dies, either parent of the child's parent who was not awarded custody, . . . may . . . seek visitation rights." MISS. CODE ANN. § 93-16-3 (1988). "This chapter shall not apply to the granting of visitation rights to the natural grandparents of any child who has been adopted . . . unless: (1) one of the legal parents of such child is also a natural parent of such child." § 93-16-7.

<sup>132</sup>*Howell*, 551 So. 2d at 906.

<sup>133</sup>N.M. STAT. ANN. § 40-9-2 (Michie 1997).

<sup>134</sup>§ 40-9-2(E).

child.<sup>135</sup> New Mexico courts are also required to consider the prior interaction between the child and the grandparents as well as between the grandparents and the child's parents.<sup>136</sup>

A New Mexico Appellate Court interpreted the New Mexico grandparent visitation statutes in *Lucero v. Hart*.<sup>137</sup> Looking at section 40-9-2, the appellate court determined that it was the intent of the legislature to extend the visitation rights of grandparents in certain situations.<sup>138</sup> The court noted that similar legislation had been enacted in Indiana and Pennsylvania.<sup>139</sup> In both Indiana and Pennsylvania, the courts held that the termination of parental rights does not automatically terminate the rights of grandparents.<sup>140</sup> Similarly, the New Mexico court considered an opinion by a Colorado court which held that grandparent visitation rights are derived from statutes, and thus, do not depend upon the continuation of the relationship between the parent and the child.<sup>141</sup> Therefore, in *Lucero*, the New Mexico court held that even though the rights of the child's parents had been terminated by the adoption, it was not inconsistent to hold that the grandparents' right to visit their grandchildren was not automatically terminated.<sup>142</sup>

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<sup>135</sup>§ 40-9-2(G).

<sup>136</sup>*Id.*

<sup>137</sup>*Lucero v. Hart*, 907 P.2d 198 (N.M. Ct. App. 1995).

<sup>138</sup>*Id.* at 201.

<sup>139</sup>*Id.* at 202.

<sup>140</sup>*Id.*; see also *In re Groleau*, 585 N.E.2d 726 (Ind. Ct. App. 1992). The Groleau court held that because the paternal grandparents could be given visitation rights pursuant to an Indiana statute, the grandparent's visitation rights were not derivative of the parent's rights. The termination of parental rights does not divest the grandparents of their visitation rights. See *Rigler v. Treen*, 660 A.2d 111 (Pa. Super. Ct. 1995). In *Treen*, the paternal grandparents of a never-married father's child petitioned for visitation rights. The court held that even though the rights of the father had been involuntarily terminated, the grandparents still had standing to petition for visitation rights because the state's statute specifically allowed grandparent visitation following the termination of a parent's rights. *Id.*

<sup>141</sup>See *Lucero*, 907 P.2d at 202; See also *Ex rel. N.S.*, 821 P.2d 931 (Colo. Ct. App. 1991). The Colorado court held that grandparent's rights are derived from statutes, not the parent's rights. In *Lucero*, however, the statute only permitted grandparent visitation after an adoption in which one natural parent remained the child's legal parent. Since the maternal grandparents adopted the grandchild, the paternal grandparents did not have a statutory right to visit their grandchild.

<sup>142</sup>*Lucero*, 907 P.2d at 201. But see *In re Adoption of Schumacher*, 458 N.E.2d 94 (Ill. App. Ct. 1983). The Illinois appellate court held that the purpose of a statute which terminates the rights of a natural parent following a child's adoption is equally applicable to grandparents in a situation where there has been a divorce and subsequent stepparent adoption. Relying on the theory of derivative rights, the court held that the grandparent's status as grandparents is derived from the parent-child relationship and when such a relationship ends, the grandparents no longer have a legal basis for demanding visitation rights. But see *Lingwall v. Hoener*, 483 N.E.2d 512 (Ill. 1985). The *Lingwall* court held that a stepparent adoption does not automatically terminate a

Other jurisdictions have also dealt with the question of whether there should be grandparent visitation following the death of a child's parent and the child's surviving parent's remarriage and stepparent adoption. Rhode Island has enacted a statute that allows grandparents whose child has died to petition the court for the right to visit their grandchildren.<sup>143</sup> The court may then allow visitation if such visitation is found to be in the child's best interests and the grandparent is found to be a "fit and proper person to have visitation rights with the grandchild."<sup>144</sup> The grandparent must also present evidence to show there was an attempt at visiting the grandchild but the grandparent was denied access by the child's parent, and that there is no way other than by court order for the grandparent to visit the child.<sup>145</sup>

Rhode Island had the opportunity to apply these statutes in a situation where the child had been adopted by a stepparent following the death of one of the child's natural parents.<sup>146</sup> In *Puleo v. Forgue*, the Rhode Island Supreme Court was faced with a situation where the mother of the child had died, and the child's father remarried a woman who adopted the child.<sup>147</sup> The maternal grandparents received a court order allowing them to continue visiting the child, but that order was suspended.<sup>148</sup> After interpreting the statutes which allow grandparents to visit their grandchildren, the court held that these same statutes allow the grandparents to visit their grandchildren even after an adoption has occurred.<sup>149</sup> The court reasoned that the adoption proceeding cannot interfere with grandparent visitation rights because such visitation rights are granted by the court.<sup>150</sup> Thus, the court can only change such visitation rights pursuant to orders which are related to visitation, not adoption.<sup>151</sup>

Finally, an Alabama appellate court was also confronted with the question of whether grandparent visitation rights survive a stepparent adoption following the death of a child's natural parent.<sup>152</sup> Section 26-10A-30 provides

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grandparent's right to visit the grandchild unless the legislature specifically mandates such a result. *Id.*

<sup>143</sup>R.I. GEN. LAWS § 15-5-24.1 (1997).

<sup>144</sup>§ 15-5-24.3.

<sup>145</sup>*Id.*

<sup>146</sup>*Puleo v. Forgue*, 610 A.2d 124 (R.I. 1992).

<sup>147</sup>*Id.* at 125.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.*

<sup>150</sup>*Id.* at 126.

<sup>151</sup>*Puleo*, 610 A.2d at 126.

<sup>152</sup>*Snipes v. Carr*, 526 So.2d 591 (Ala. Civ. App. 1988).

for grandparent visitation after the grandchild is adopted by a relative.<sup>153</sup> Such visitation will be granted if the Alabama court determines that such visitation is in the child's best interest.<sup>154</sup> In *Snipes v. Carr*, the child's father was killed before the child was born.<sup>155</sup> The child's mother then remarried, and her husband adopted her child.<sup>156</sup> Before the child's mother stopped allowing the child's paternal grandparents to visit their grandchild, the grandparents had visited the child regularly.<sup>157</sup> Under Alabama law, adoption does not have the effect of automatically terminating the right of grandparents to visit their grandchildren.<sup>158</sup> There was evidence that grandparent visitation was in the child's best interests.<sup>159</sup> Therefore, despite the stepparent adoption, the court determined that it was in the best interest of the child to continue to visit his grandparents.<sup>160</sup> Thus, visitation was permitted to continue.<sup>161</sup>

#### VI. STUDIES AND COMMENTARIES IN SUPPORT OF GRANDPARENT VISITATION AFTER ADOPTION

One widely-cited study supporting grandparent visitation rights was conducted by Dr. Arthur Kornhaber.<sup>162</sup> In this three-year study, Dr. Kornhaber found that many benefits were bestowed on grandchildren as a result of their grandparent relationships.<sup>163</sup> Those children who had relationships with their

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<sup>153</sup>ALA. CODE § 26-10A-30 (1997).

<sup>154</sup>*Id.*

<sup>155</sup>*Snipes*, 526 So.2d at 592.

<sup>156</sup>*Id.*

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* at 593.

<sup>159</sup>The grandparents had shown love and concern for their grandchild and had tried to maintain a relationship with the child. There was also evidence that the grandparents had gotten along with the child's parents prior to the dispute which led to the parents terminating the grandparents' right to visit their child. *Id.* at 592.

<sup>160</sup>*Snipes*, 526 So.2d at 593.

<sup>161</sup>*Id.*

<sup>162</sup>KORNHABER, *supra* note 11, at 3. Dr. Kornhaber is a physician, child psychiatrist, and was formerly a family practitioner. He is also the president of the Foundation for Grandparenting. Dr. Kornhaber testified in front of Congress about his findings regarding the importance of the grandparent-grandchild relationship. His testimony favored a uniform grandparent visitation law on the basis of his findings that grandchild-grandparent relationships benefit all those involved and thus, need to be protected. *Hearing Before the Subcomm. on Separation of Powers of the Comm. On the Judiciary*, 98th Cong. 28-33 (1983) (statement of Arthur Kornhaber, M.D.).

<sup>163</sup>KORNHABER, *supra* note 11, at 36. The Grandparent Study lasted for three years and involved the interviewing of 300 grandparents and grandchildren. The subjects came from different areas of the United States. The information was obtained from the grandparents by using both a structured questionnaire and an unstructured interview. The children were asked to draw a picture of their grandparents and were then asked

grandparents felt emotionally secure because they had another adult to go to if their parents were unavailable.<sup>164</sup> These children also had a positive image of aging, felt rooted in their past, and had positive self-esteem.<sup>165</sup> The grandparents also were found to fill certain roles for their grandchildren according to the grandchildren's needs.<sup>166</sup> The most significant finding was that the grandparent-grandchild bond was second only to the parent-child bond in emotional importance.<sup>167</sup> However, not all commentators have accepted the results of Dr. Kornhaber's study.<sup>168</sup>

Even if one does not agree that Dr. Kornhaber's results apply to all grandchild-grandparent relationships, his study still supports grandparent visitation. The fact that his study showed that there are ways in which a grandparent's relationship with a grandchild is beneficial tends to prove that in some instances such visitation would be in the child's best interest.<sup>169</sup> Supporters of the study and its critics would agree that for some of the children studied, their relationship with their grandparents had a positive effect on them. Therefore, a case-by-case analysis of the best interests of the child, as

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questions about it. The children were then given interviews during which they were asked questions about their perceptions of their grandparents and the role of their grandparents in their life, as well as the ways that they related to their grandparents. *Id.* at 3-4.

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* at 89-103. The grandparents were seen by different children as family historians providing a link between the child's present and past, mentors, role models, nurturers, and playmates. Because grandparents fulfill different needs for different children, there needs to be a case-by-case determination of whether the grandparent's role is important to a particular child.

<sup>167</sup>KORNHABER, *supra* note 11, at 3-4.

<sup>168</sup>Elaine D. Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. VA. L. REV. 295, 299 (1985). Among the criticisms of Dr. Kornhaber's study: the results have not been replicated by other studies; the study did not control for the difference in demographics; the study failed to distinguish children by age; and the pictures drawn were not evaluated by any criteria that was set up before the study began. *Id.*

<sup>169</sup>Zablotsky, *supra* note 88, at 35-43. This review answered some of the basic arguments that are posed by those who are against grandparent visitation after adoption. One argument is that there needs to be protection of parental authority within the new family. *Id.* However, the author points out that grandparents usually do not have as much authority over their grandchildren as their parents do. There is also the argument that grandparent visitation following a stepparent adoption will cause instability within the new family and will cause the child confusion because he will have more sets of grandparents than he used to have. *Id.* The author answers these arguments by stating that grandparents, in times of crisis, tend to stabilize the situation rather than aggravate the situation. Also, the author states that it makes little sense to sever what could be a beneficial relationship so that the child's relationships would be consistent with the number of relationships a child usually has.

advanced in *Graziano*, would be able to take this fact into account and allow visitation where it is in the child's best interests and to deny it when it is not.

Grandparent visitation may also be important for the child in times of family tragedy, such as when parents divorce or a parent dies.<sup>170</sup> In these times of crisis, a grandparent may be a source of comfort and stability.<sup>171</sup> In these situations, the grandparent's love and affection may mitigate the child's feelings of guilt or rejection and help the child make the transition into his or her new family.<sup>172</sup> This fact may explain why some Ohio courts allow grandparent visitation after the death of a child's parent. If one accepts this view of grandparents, however, then Ohio courts would be inconsistent in their holdings by allowing grandparent visitation after a parent's death and subsequent stepparent adoption but denying such visitation after a divorce followed by a stepparent adoption. Both are stressful events that children may need help dealing with, and grandparents may be able to provide that support.

In addition, courts may not always be able to sever the affectionate relationship that exists between the adopted children and their grandparents.<sup>173</sup> This is especially true in the case of older children, who can

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<sup>170</sup>Susan L. Barineau, *Grandparental Rights To Visitation and Custody: A Trend in the Right Direction*, 15 CUMB. L. REV. 161 (1984).

<sup>171</sup>See Zablotzky, *supra*, note 88 at 43; Barineau, *supra* note 170. But see Ross A. Thompson, et. al., *Grandparent Visitation Rights: A Psycholegal Analysis*, 29 FAM. AND CONCILIATION CTS. REV. 9 (1991). The authors suggest that if there is already stress in the family, the additional stress created by a dispute between grandparents and parents over visitation rights could possibly be harmful to the children. *Id.* The authors concede that in certain instances the children may benefit from court-mandated visitation in spite of the extra stress that such proceedings create. *Id.* However, the authors do not have enough empirical evidence to draw a conclusion regarding the benefits versus the harm that additional stress concerning grandparent visitation rights has on the children.

<sup>172</sup>*Mimkon v. Ford*, 332 A.2d 199 (N.J. 1975); See also *Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981). The *Sibley* court stated that the state should allow grandparents to continue to visit their grandchildren if it is in the children's best interests. Visitation grants should especially be allowed when a parent dies because this stress can be lessened by the love and support of a grandparent. In addition, the child in this situation should not be forced to deal with the loss of another relative.

<sup>173</sup>*Cranston v. Zook*, 399 P.2d 53 (Cal. 1965). See also *In re Robert D.*, 198 Cal. Rptr. 801 (Cal. Ct. App. 1984). The court granted visitation rights to grandparents in spite of the fact that the grandparents and the child's mother did not get along. Part of the court's rationale included its belief that if the court deprived the child now of his relationship with his natural relatives, the child may be hurt in the future if he tries to reestablish a relationship with his relatives. See also KORNHABER, *supra* note 11, at 188-89. In the Grandparent Study, one finding was that some of the young adults who were interviewed had been deprived of the opportunity to visit their grandparents as children and reported that it was a very painful experience for them. *Id.* Some of these adults were now trying to reestablish ties with their grandparents. Some of the other children interviewed, instead of being hurt by the stress of litigation in their grandparent's fight to visit them, instead felt pride that their grandparents loved them enough to fight to see them. *Id.*

remember the relationship they formerly had with their grandparents.<sup>174</sup> This is also true in cases where a child is adopted by a stepparent, since the child may have had extensive contact with the grandparent and other relatives prior to the divorce or death of the parent. Because of the existence of situations in which it would be in the best interest of the child to continue visitation following an adoption, the legislature should amend the adoption and visitation statutes to allow courts to grant grandparent visitation rights when it is in the child's best interests. After such an amendment, the legislature should give specific guidelines to help the courts determine whether grandparent visitation is in the child's best interest.<sup>175</sup>

Finally, there is evidence which seems to suggest that the poor relationship between parents and grandparents which may have led to the parent's denial of access to the grandparent's grandchildren may not be a threat to the well-being of the grandchild.<sup>176</sup> Dr. Kornhaber's study found that the majority of grandparents studied did not commit the same mistakes with their grandchildren that they committed with their children.<sup>177</sup> This indicates that the grandchildren may have a chance at having a healthy relationship with their grandparents even if the child's parents did not have one with their parents. Therefore, the courts should be able to determine whether grandparent visitation is in the child's best interests because the parent might not always be able to objectively determine the child's best interests with regard to the grandparents.

## VII. CONCLUSION

Courts in Ohio are not presently allowed to give grandparents the right to visit their grandchildren even if the continuation of such visits is in the child's best interests. Before the Ohio Supreme Court tied the hands of all trial and

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<sup>174</sup>Judy E. Nathan, *Visitation after Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 659 (1984).

<sup>175</sup>See KORNHABER, *supra* note 11, at 185. The American Bar Association recommended that state legislatures supply the courts with guidelines for determining the child's best interests. The following are factors which the American Bar Association recommends that legislatures use: the scope of the grandparent-grandchild relationship; the effect of grandparent visitation on the child's psychological development; whether such visits will disrupt the child's relationship with his or her parent; whether visitation will provide support and stability to a family which has experienced death or divorce; the child's wishes; and the ability of the parents and grandparents to cooperate. The Bar Association advocates a case-by-case determination of whether visitation rights should be granted to grandparents. *Id.*

<sup>176</sup>KORNHABER, *supra* note 11.

<sup>177</sup>*Id.* at 3, 36. The study contained observations made by both grandparents and the children's parents, who were included in the study but whose answers were not included in the study's report. Among the observations made by the children's parents were that the grandfather was "less judgmental" with the grandchildren than he had been with the children's mother, and that a grandmother appeared "less nervous and critical" when she was around her grandchildren as opposed to her children.



appellate courts in Ohio, the courts were able to determine on a case-by-case basis whether grandparent visitation was in the child's best interest. Ohio courts sometimes included in their decisions to allow grandparent visitation that, in their opinion, to decide otherwise would be unfair to the grandchildren. The Ohio Supreme Court justices in *Ridenour* and *Martin* shared these same sentiments, but felt that their interpretation of section 3107.15 mandated that all ties between natural relatives and adopted children be severed upon the child's adoption.

In order to stop this practice of forbidding grandparents from visiting their grandchildren in all cases after an adoption has occurred, the Ohio legislature needs to amend its adoption statutes in order to allow such visitation under limited circumstances. Other state legislatures, such as Mississippi, which felt the tension between doing what was in the best interests of the grandchildren and following what it believed to be the right course of action according to its statutes, amended the statutes. Because in some instances grandparent visitation is beneficial to the grandchildren, the only solution that takes the interests of both the grandparents and grandchildren into account is the best interest test. If this test is incorporated into an Ohio statute, then courts will be able to review the evidence before them and render a decision in which they truly believe instead of forcing them to interpret a statute which they do not believe benefits children in all situations.

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